(3)

No. 85-1449

Supreme Court, U.S.
FILED
JUN 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TOWN OF NEWTON, et al,

Petitioners,

v.

BERNARD E. RUMERY, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., AND THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., IN SUPPORT OF THE PETITIONERS

Pandick Midwest, Inc., Chicago • 735-6000

OF COUNSEL:

DANIEL B. HALES, ESQ.
Peterson, Ross, Schloerb
and Seidel
President,
Americans for Effective
Law Enforcement, Inc.
Chicago, Illinois 60656

WILLIAM C. SUMMERS, ESQ.
Supervising Attorney,
International Association of
Chiefs of Police, Inc.
13 Firstfield Road
Gaithersburg, Maryland
20878

JACK E. YELVERTON, ESQ.
Executive Director,
National District Attorneys
Association, Inc.
1033 N. Fairfax Street
Alexandria, Virginia 22314

FRED E. INBAU, ESQ.
John Henry Wigmore
Professor of Law, Emeritus,
Northwestern University
School of Law
Chicago, Illinois 60611

WAYNE W. SCHMIDT, ESQ.
Executive Director,
Americans for Effective
Law Enforcement, Inc.
5519 N. Cumberland
Avenue, #1008
Chicago, Illinois 60656

JAMES P. MANAK, ESQ.
General Counsel,
Americans for Effective
Law Enforcement, Inc.
Executive Editor,
National District Attorneys
Association, Inc.
33 North LaSalle Street
Suite 2108
Chicago, Illinois 60602

Counsel for Amici Curiae

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
BRIEF OF AMICI CURIAE	1
INTEREST OF AMICI CURIAE	2
ARGUMENT	3
THIS COURT SHOULD REJECT A PER SE PROHIBITION OF ALL RELEASE-DISMISSAL AGREEMENTS, AND SHOULD APPROVE SUCH AGREEMENTS THAT ARE VOLUNTARY, DELIBERATE AND INFORMED BY THE PRESENCE OF COUNSEL	3
CONCLUSION	8

TABLE OF AUTHORITIES

PAGE

Cases

Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969) 7

Britton v. City of Trinidad, 687 P.2d 523 (Colo. App. 1984) 3

Bushnell v. Rossetti, 750 F.2d 298 (4th Cir. 1984) .. 6

Enslen v. Village of Lombard, 128 Ill. App. 3d 531, 470 N.E.2d 1188 (1984) 3

Hoines v. Barney's Club, Inc., 28 Cal. 3d 603, 620 P.2d 628 (1980) 4, 7

Jones v. Taber, 648 F.2d 1201 (9th Cir. 1981) 6

MacDonald v. Musick, 425 F.2d 373 (9th Cir. 1970) 5

North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160 (1970) 7

Rumery v. Town of Newton, 778 F.2d 66 (1st Cir. 1985) 3

Statute

42 U.S.C. Section 1983 5

Articles

Germond, "President's Message", National Sheriff (October-November 1985) 5

Lindsey, "Rising Tide of Liability Suits in Nation Forcing Changes in Lives", New York Times, November 18, 1985 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TOWN OF NEWTON, et al,

Petitioners,

v.

BERNARD E. RUMERY, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., AND THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., IN SUPPORT OF THE PETITIONERS

This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Counsel for Petitioners and Respondent. Letters of Consent of all parties have been filed with the Clerk of this Court.

INTEREST OF AMICI CURIAE

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* seventy-three times in the Supreme Court of the United States, and thirty-six times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 12,600 members in 62 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The National District Attorneys Association, Inc. (NDAA) is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publication, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

ARGUMENT

THIS COURT SHOULD REJECT A PER SE PROHIBITION OF ALL RELEASE-DISMISSAL AGREEMENTS, AND SHOULD APPROVE SUCH AGREEMENTS THAT ARE VOLUNTARY, DELIBERATE AND INFORMED BY THE PRESENCE OF COUNSEL.

Americans for Effective Law Enforcement has been privileged to file many *amicus curiae* briefs with this Court. In several of them, as in the present one, it has been joined by the *National District Attorneys Association,* the *International Association of Chiefs of Police,* various other associations of chiefs of police and sheriffs. Those briefs have often presented an analysis of the relevant case law and offered suggestions to the Court for decisions that would aid rather than unduly hinder effective law enforcement, and without impinging upon basic constitutional protections. In the present brief, we will not undertake an extended analysis of the case law, but will confine our brief to the law enforcement and public policy impact of the issues.

In the case below, *Rumery v. Town of Newton,* 778 F.2d 66 (1st Cir. 1985), the court rejected *all* release-dismissal agreements entered into by criminal defendants as void *ab initio. Amici* suggest that release agreements may be entered into either for legitimate or improper reasons. We concede that many abuses have occurred, and that a significant number of releases have been the product of some level of coercion, although most have been voluntary. A greater number of releases are *not* obtained under duress, but are reluctantly agreed to by individuals because the alternative involves lawful, but more adverse consequences. An example of the latter is the "resign or be fired" ultimatum, which has been upheld by numerous courts, *e.g., Enslen v. Village of Lombard,* 128 Ill. App. 3d 531, 470 N.E.2d 1188 (1984); *Britton v. City of Trinidad,* 687 P.2d 523 (Colo. App. 1984). Both cases involved public employees.

Some of the legitimate reasons for release-dismissal agreements entered into by criminal defendants voluntarily, deliberately, and when informed by their own counsel, are (1) to protect the interests of victims and witnesses, (2) to balance the interests of justice in cases where the continuation of criminal prosecution may be unnecessarily devastating to defendants, and (3) to protect police and municipalities from unfounded civil litigation arising from the arrest of defendants. *Amici* submit that these reasons are (1) proper, (2) do not violate the Constitution, (3) do not offend federal public policy when the agreement is enforced, and (4) are present in the instant case as reflected in the record where the defendant was represented by competent counsel who *sought* the agreement, and the prosecutor acted to avoid further anxiety for the victim who was also a key witness in a related case, and to protect the police and municipality from the defendant's threatened civil action. There is no evidence in the instant case of police or prosecutorial misconduct. The record also indicates that the prosecutor was not unmindful of the defendant's own best interest as served by the dropping of the criminal charge.

As noted by the Supreme Court of California in *Hoines v. Barney's Club, Inc.*, 28 Cal. 3d 603, 620 P.2d 628 (1980), quoting from the lower court:

> Municipal court judges for many years have been accustomed to dismissing minor misdemeanor cases on motion of the district attorney upon assurance that law enforcement officers, public agencies or private parties will not be subjected to civil litigation by the criminal defendant. This occurs not infrequently in shoplifting cases, disturbances involving husbands and wives, and a myriad of other disturbance situations. Often, the arrest and temporary detention of a person . . . is sufficient to defuse an otherwise volatile situation, to the end that further criminal prosecution is unnecessary and undesirable. Further prosecution in many cases would cause embarrassment in employment, unnecessary matrimonial hostility or . . . a possible thwarting of a future career. The reasons are multitudinous for

> the district attorney not to want to pursue the prosecution of a person arrested with probable cause for a minor public offense, in the best interest not only of society but of the individual involved. At the same time, it is reasonable to seek to protect the arresting officer or the complaining individual from the burden of civil litigation arising out of the incident.
>
> If this tool is taken away from the district attorney, . . . there will be a likelihood that many cases which otherwise would have been dismissed will be prosecuted, to the detriment of society as well as the victim and the defendant.

28 Cal. 3d at 610, n. 7, 620 P.2d at 633, n. 7. (The case involved the enforcement of an out-of-state release given by a Nevada casino.) These proper interests were also highlighted by Judge Kilkenny in *MacDonald v. Musick,* 425 F.2d 373, 377 (9th Cir. 1970) (dissenting opinion) when he noted that ". . . those in charge of prosecution of criminal actions have a duty to protect, if probable cause exists, arresting officers from both *state or federal civil actions.*" (emphasis added).

Amici submit that many such suits, as threatened or filed, are baseless. The costs of defending them, however, are staggering and have led to a crisis in the ability of municipalities to afford, or even *obtain,* liability insurance covering actions under 42 U.S.C. Section 1983, and pendant exposure. Richard L. Germond, President of the National Sheriffs Association, highlighted the problem this way in the October-November 1985 issue of National Sheriff, President's Message:

> This exposure has obviously been one of the contributing causes for the phenomenal increases in insurance industry premiums. As an example, in my own situation, my county suffered nearly a 300% increase in premiums for both law enforcement liability and general liability coverages this year.
>
> . . .

> We all know that many cases are filed merely because governmental units are viewed as "collectible" and, even if the case is dismissed without trial or settlement, the defendant becomes liable for the costs of legal defense. *Too many cases are filed in hopes of an out of court settlement by the insurance company knowing full well there was no cause of action that would stand up in trial.* (emphasis added).

Even the media have taken notice of this liability crisis. In the New York Times of November 18, 1985, in an article entitled "Rising Tide of Liability Suits in Nation Forcing Changes in Lives," it was stated by Robert Lindsey at p. 16 cols. 1 and 2: "Hundreds of cities report that liability insurance rates have doubled or tripled or that liability insurance has become unavailable to them at any cost. Insurance companies blame a series of multimillion-dollar judgments against other cities. . . . "

Amici submit that the per se rule espoused by the court below for unenforceability of *all* release-dismissal agreements will defeat the legitimate interests of police administrators and prosecutors from protecting municipalities from baseless and frivolous civil litigation. The case-by-case approach for assessing the propriety of such agreements adopted by the Fourth Circuit Court of Appeals in *Bushnell v. Rossetti,* 750 F.2d 298 (1984), and the Ninth Circuit Court of Appeals in *Jones v. Taber,* 648 F.2d 1201 (1981), and other courts, adequately protects the interests of all parties—defendants, victims and witnesses, the police, prosecutors, and municipalities.

The rule that *amici* urge in such cases is *limited,* in order to ensure the protection of all proper interests: *only release-dismissal agreements formed at any phase of criminal proceedings that are voluntary, deliberate, and entered into by informed criminal defendants represented by counsel should be enforceable as a bar to subsequent civil litigation based upon the filing of the original criminal charge.*

Under such circumstances, these agreements are conceptually no different from plea agreements recognized as proper with appropriate safeguards by this Court in *Boykin v. Alabama,* 395 U.S. 238, 89 S.Ct. 1709 (1969), and *North Carolina v. Alford,* 400 U.S. 25, 91 S.Ct. 160 (1970). As noted by the Supreme Court of California in *Hoines, supra,* "[s]urely we cannot embrace a proper plea bargaining transaction while rejecting a proper release-dismissal transaction as against public policy." 28 Cal. 3d at 613, 620 P.2d at 635.

Indeed, if release-dismissal agreements are per se void as against public policy, it is difficult to see how the entire plea bargaining process could have withstood scrutiny in *Boykin* and *Alford.* In effect, the parties in the instant case engaged in that very process. *Amici* submit that the narrow rule we urge will balance the proper interests of all parties and will not offend federal public policy or constitutional strictures. The record of the instant case amply demonstrates that the rule we urge was followed by the parties.

CONCLUSION

Amici respectfully request this Court to reject the per se rule adopted by the court below, and to approve as not violative of federal public policy or constitutional strictures, the enforcement of release-dismissal agreements formed at any phase of criminal proceedings that are voluntary, deliberate and entered into by informed criminal defendants represented by counsel, and urge that the decision of the court below should be reversed on the basis of law and sound judicial policy.

Respectfully submitted,

OF COUNSEL:

DANIEL B. HALES, ESQ.
Peterson, Ross, Schloerb and Seidel
President,
Americans for Effective Law Enforcement, Inc.
Chicago, Illinois 60656

WILLIAM C. SUMMERS, ESQ.
Supervising Attorney,
International Association of Chiefs of Police, Inc.
13 Firstfield Road
Gaithersburg, Maryland 20878

JACK E. YELVERTON, ESQ.
Executive Director,
National District Attorneys Association, Inc.
1033 N. Fairfax Street
Alexandria, Virginia 22314

FRED E. INBAU, ESQ.
John Henry Wigmore Professor of Law, Emeritus,
Northwestern University School of Law
Chicago, Illinois 60611

WAYNE W. SCHMIDT, ESQ.
Executive Director,
Americans for Effective Law Enforcement, Inc.
5519 N. Cumberland Avenue, #1008
Chicago, Illinois 60656

JAMES P. MANAK, ESQ.
General Counsel,
Americans for Effective Law Enforcement, Inc.
Executive Editor,
National District Attorneys Association, Inc.
33 North LaSalle Street
Suite 2108
Chicago, Illinois 60602

Counsel for Amici Curiae